

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

76-2024

B/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-2024

UNITED STATES OF AMERICA,

Appellee,

- against -

CARMINE J. PERSICO, JR.,

Appellant.

On Appeal From the United States District Court
for the Eastern District of New York

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC IN BEHALF OF APPELLANT

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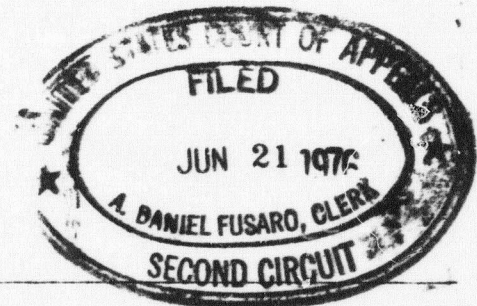


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-2024

UNITED STATES OF AMERICA,
Appellee,

- against -

CARMINE J. PERSICO, JR.,
Appellant.

On Appeal from the United States District Court
for the Eastern District of New York

SUGGESTION FOR REHEARING EN BANC
IN BEHALF OF APPELLANT

Carminc J. Persico, Jr. petitions the Court for
rehearing en banc (F.R.A.P., Rule 35), upon the grounds that
consideration by the full Court: (1) is necessary to secure

or maintain uniformity of its decisions, and (2) the questions presented are of exceptional importance.

Questions Presented for Rehearing En Banc

1. (a) Does the sentencing court maintain jurisdiction in an action brought under Title 28 United States Code Section 2255 which is with respect to a sentence imposed by the sentencing court pursuant to Title 18 United States Code Section 4208(a)(2), and the defendant alleges that the expectation of the sentencing court and the intent of Congress as expressed in the statute has been distorted, disregarded, abridged and abrogated to such an extent as to deny the defendant due process of law?

(b) Did the failure of the United States Board of Parole to afford appellant serious and meaningful parole consideration, coupled with the course of action and conduct otherwise attendant to defendant-appellant's parole release process result in an abuse of authority granted to the Parole Board by statute and amount to the denial of due process of law warranting remedial relief by way of Title 28 United States Code Section 2255 by the sentencing court which originally imposed defendant-appellant's sentence pursuant to Title 18 United States Code Section 4208(a)(2)?

(c) Can the panel decision of this Court be reconciled with the decision of the Supreme Court of the United States in Davis v. United States, 417 U.S. 333, 94 S. Ct. 2298, 41 L. Ed. 2d 109 (1974)?

Introductory Facts

Mr. Persico is incarcerated in the Federal Correctional Institution in Marion, Illinois. He has brought numerous actions in the Eastern District of Illinois seeking serious and meaningful parole consideration, but the court has been oblivious to having his actions judicially resolved.

For nearly one and one-half years the District Court for the Eastern District of Illinois has not determined Mr. Persico's action seeking protection of legally recognized rights in terms of his parole application (See A.241 and Appellant's brief to the Court pps. 9-12). This fact, coupled with the continued indifference of the United States Board of Parole to the rights of the defendant in his parole application, resulted in a manifest denial of due process of law to Mr. Persico.

Mr. Persico was sentenced to a fourteen-year period of incarceration pursuant to 18 U.S.C. § 4208(a)(2). Sentence was imposed by the Hon. John F. Dooling on June 6,

1969, after Mr. Persico's conviction by jury of Title 18 United States Code Section 1951, in the United States District Court for the Eastern District of New York.

Judge Dooling initially indicated he did not wish to enter judgment of conviction against Mr. Persico because of the protracted and exhausting prosecution in his case. This Court in United States v. Dooling, 406 F. 2d 192 (1969), directed otherwise, and resultantly the above stated sentence was imposed against him. Judge Dooling, however, stated that he would not have imposed such a harsh sentence unless it was pursuant to 18 U.S.C. § 4208(a)(2).

Reasons for Granting Rehearing En Banc

Appellate review must insure the quality of justice, not diminish it. Thus, the decision of the panel of this Court in this case was removed and remote from the spirit and intent of the decision of this Court in Grasso v. Norton, 520 F. 2d 27, 2d Cir. (1975), and from the decision of the Supreme Court of the United States in Davis v. United States, 417 U.S. 333, 94 S. Ct. 2298, 41 L. Ed. 2d 109 (1974).

Mr. Persico has alleged that not only has he been denied serious and meaningful parole consideration, contrary

Grasso v. Norton, supra, but his efforts to receive fair parole treatment has been totally disregarded by both the United States Board of Parole and the United States District Court for the Eastern District of Illinois. Moreover, Mr. Persico alleges incarceration well beyond the Parole Board's own guidelines, and for reasons which are totally inconsistent and not consonant with a sentence imposed under United States Code § 4208(a)(2). See Appellant's brief to this Court. The thrust of Mr. Persico's contention is clear: his continued incarceration is both improper and illegal. Consequently, his action to the United States District Court for the Eastern District of New York, the court which imposed sentence pursuant to 18 U.S.C. § 4208(a)(2), is fully proper. The Supreme Court of the United States poignantly stated in support of Mr. Persico's application pursuant to 28 U.S.C. § 2255:

"[The legislative history to 28 U.S.C. § 2255] makes clear that § 2255 was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus. As the Court pointed out in United States v. Hayman, 342 U.S. 205, 219, 72 S. Ct. 263, 272, 96 L. Ed. 232 (1952), the 'history of Section 2255 shows that it was passed at the instance of the Judicial Conference to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere in the history

of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.' Thus, there can be no doubt that the grounds for relief under § 2255 are equivalent to those encompassed by § 2254, the general federal habeas corpus statute, under which relief is available on the ground that '[a person] is in custody in violation of the Constitution or laws or treaties of the United States.' (Emphasis added). ...In recommending to Congress what eventually became § 2255 the Judicial Conference Committee on Habeas Corpus Procedure stated that '[t]he motion remedy broadly covers all situations where the sentence is 'open to collateral attack'. As a remedy, it is intended to be as broad as habeas corpus.' (94 S. Ct., at 2304; emphasis added)".

Mr. Persico alleges a miscarriage of justice in terms of the sentence imposed against him (See Appellant's brief), and sets forth exceptional circumstances where the need for the remedy afforded by 28 U.S.C. § 2255 is apparent. Cf. Davis v. United States, supra, 94 S. Ct., at 2305. The nature of Mr. Persico's claim has been recognized as both substantial and meritorious, see Grasso v. Norton, supra; Kortness v. United States, 514 F. 2d 167 (7th Cir. 1975); United States v. Slutsky, 514 F. 2d 1222; Garafola v. Benson, 505 F. 2d 1212 (7th Cir. 1974); United States v.

Randle, 408 F. Supp. 5 (N.D. Ill., 1975), and other authorities cited in Appellant's brief to this Court. These cases clearly state that the sentencing court has continuing jurisdiction to review a sentence pursuant to 18 U.S.C. § 4208(a)(2), and thus are consonant with the Supreme Court's holding in the Davis case. The memorandum order and decision of the panel of this Court (Appendix "A" annexed hereto) is in line with Mr. Justice Rehnquist's dissent in the Davis case, to which the majority of the High Court stated:

"Indeed the nub of the dissent is that § 2255 'does not speak of illegal 'confinement' ...or even of an illegal conviction, but rather of illegal sentences.'....[A]lthough this microscopic analysis of § 2255 surely shows that the statutory language is somewhat lacking in precision, the resulting shadow that the dissenting opinion would cast over the statute totally disappears in the light of the legislative history."

The Court continued by stating that Section 2255 is as broad as habeas corpus relief. See supra, page 5. It is clear beyond a shadow of a doubt that the relief requested in Mr. Persico's Section 2255 application is a very pure strain of habeas corpus warranting due consideration by the sentencing court and appellate review such as to amend

the miscarriage of justice against him and to correct the manifest denial of due process.

Conclusion

For all the above reasons, this Court should grant rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that on June 21, 1976, two
copies of the Petition for Rehearing and Suggestion for Rehearing
En Banc in Behalf of Appellant were mailed to counsel for
Appellee at the following address:

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c/o T. George Gilinsky,
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ROSENBERG, ROSENBERG, EHRLICH & SCHUMINSKY

By: _____

MARC A. ROSENBERG

United States Court of Appeals

FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 8th day of June one thousand nine hundred and seventy-six.

Present:

HON PAUL R. HAYS

HON. WILLIAM H. MULLIGAN

HON. THOMAS J. MESKILL

Circuit Judges,

UNITED STATES OF AMERICA,

Appellee,

-against-

CARMINE J. PERSICO, JR.,

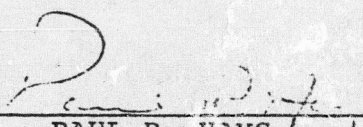
Appellant

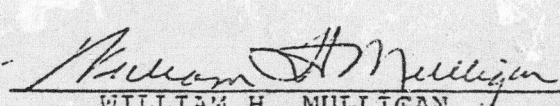
Dkt. 76-2024

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed on the opinion below. The mere imposition of a sentence under 18 U.S.C. § 4208(a)(2) does not vest continuing jurisdiction in the sentencing court to review the prisoner's parole treatment, or to reduce the sentence after the time limits of Fed. R. Crim. P. 35 have run.


PAUL R. HAYS


WILLIAM H. MULLIGAN

APPENDIX "A"